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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 643

PAUL DEEMER JOHNSTON AND JOHN SOKOL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 704

UNITED STATES OF AMERICA, PETITIONER

v.

DUDLEY A. PATTESON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit in No. 643 (No. 643 R. 11–17)[1] is

[1] The symbol "No. 643 R." refers to the printed record in the *Johnson* and *Sokol* cases (No. 643); the symbol "No. 704 R." to the printed record in the *Patteson* case (No. 704).

reported at 227 F. 2d 745, and the opinion of the United States District Court for the Eastern District of Pennsylvania (No. 643 R. 8–9) at 131 F. Supp. 955.

The opinion of the Court of Appeals for the Tenth Circuit in No. 704 (No. 704 R. 10–13) is reported at 228 F. 2d 257, and the opinion of the United States District Court for the District of Kansas (No. 704 R. 6–8) at 132 F. Supp. 67.

JURISDICTION

The judgments of the Court of Appeals for the Third Circuit in No. 643 were entered December 1, 1955 (No. 643 R. 18–19) and petitions for rehearing were denied January 4, 1956 (No. 643 R. 20). A joint petition for a writ of certiorari was filed on January 26, 1956 and was granted March 5, 1956 (No. 643 R. 20). The judgment of the Court of Appeals for the Tenth Circuit in No. 704 was entered January 19, 1956 (No. 704 R. 13). The petition for a writ of certiorari was filed February 17, 1956, and was granted March 5, 1956 (No. 704 R. 14). The jurisdiction of this Court in each case rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether venue of the crime of failing or neglecting to obey an order of a local draft board to a conscientious objector to report for civilian work, pursuant to Section 6 (j) of the Universal Military Training and Service Act, lies in the district where the work was to be performed or in

the district where the registrant told his local board that he would refuse to report.

STATUTE INVOLVED

The pertinent portions of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 65 Stat. 75, provide:

> Section 6 (j) of the Act (50 U. S. C. App. 456 (j)):
>
> * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, * * * if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * *
>
> Section 12 (a) of the Act (50 U. S. C. App. 462 (a)):
>
> * * * Any * * * person * * * or who in any manner shall knowingly fail or neg-

> lect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

Both the government as petitioner in No. 704, and the petitioners Johnston and Sokol in No. 643 based their petitions for writs of certiorari on the conflict between the Tenth and Third Circuits in *United States* v. *Patteson*, 229 F. 2d 257, and *United States* v. *Johnston and Sokol*, 227 F. 2d 745, respectively. Since there is a common issue of law involved in all three cases, we shall treat all three cases together, as has opposing counsel.

The facts in each case may be summarized as follows:

No. 704

An indictment returned in the United States District Court for the District of Kansas charged that respondent Patteson on or about July 26, 1954, in "the District of Kansas and within the jurisdiction of this court," after having been classified 1-O (conscientious objector opposed to noncombatant service) by his local board in Okla-

homa, and after having been mailed an order directing him to report on July 26, 1954, for civilian work contributing to the maintenance of the national health, safety and interest, "did knowingly and willfully refuse, neglect and fail to report at the Topeka State Hospital [in Kansas] at the time and place so designated in said order" (No. 704 R. 1).

The Kansas District Court *sua sponte* ordered the cause transferred under Rule 21 (b), F. R. Crim. P.,[2] to the Western District of Oklahoma, where respondent resided and where his draft board was located (No. 704 R. 2). That court, however, retransferred the cause to the Kansas court on the ground that the jurisdiction of the offense was solely in Kansas (No. 704 R. 3).

Respondent then moved in the Kansas court to dismiss the indictment for lack of venue. He alleged that he resided and that his draft board was located in Oklahoma City, Oklahoma; that he registered under the Universal Military Training and Service Act with his local board there; that he received his Order to Report for Civilian

[2] That rule provides:

"The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

Work (S. S. S. Form No. 153 (See *infra*, pp. 22–23, 56) to perform work at the Topeka State Hospital at Topeka, Kansas; that "he reported at his local [*sic*] in Oklahoma City and personally notified the board that he would refuse to accept such employment at the Topeka State Hospital"; and that he neither reported to the Topeka State Hospital nor left the State of Oklahoma "to report for the assigned work" (No. 704 R. 3–4). Under these circumstances, he argued, "the failure to perform the duty that constitutes the offense occurred in the State of Oklahoma" and "the refusal to report to the hospital was an act that was committed in the Western District of Oklahoma and not in the District of Kansas" (No. 704 R. 4).

The Kansas District Court dismissed the indictment, holding that venue of the crime was in Oklahoma rather than in Kansas (No. 704 R. 6–9). In affirming the judgment of the District Court on appeal by the Government (No. 704 R. 13), the Court of Appeals for the Tenth Circuit held that "the duty required of [respondent] by the order was to proceed to Topeka" and that "his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further." The court further stated, "had he proceeded to Topeka and then refused to do the assigned work, a separate offense would have been committed" (No. 704 R. 12, 10–13).

The indictment returned against petitioner Johnston in the United States District Court for the Eastern District of Pennsylvania charged that on or about November 30, 1953, at Norristown, Pennsylvania, in the Eastern District of Pennsylvania he "did knowingly neglect to perform a duty imposed upon him by the provision of said Act [the Selective Service Act of 1948 as amended by the Universal Military Training and Service Act] in that he failed and refused to obey an order of Local Board 87, New Castle, Pennsylvania, directing him to report for employment at Norristown State Hospital, Norristown, Pennsylvania, and to remain employed there for twenty-four consecutive months in violation of Title 50, U. S. C. Appx., Sections 456 and 462, as amended" (No. 643 R. 4).

Johnston moved to dismiss the indictment on the grounds that the court was without jurisdiction over him, that "the offense, if any, is cognizable only in the District Court for the Middle [*sic*] District of Pennsylvania"; and that a trial under the indictment would deny him procedural due process (No. 643 R. 5). It was stipulated on the motion that Johnston registered with the local draft board in the Western judicial district of Pennsylvania where he resided, and that he had been classified I-O (No. 643 R. 7). It was also stipulated that he was sent the customary Order

to Report for Civilian Work (S. S. S. Form 153; see *infra*, pp. 22–23, 56) advising him of his assignment to hospital work at the Norristown State Hospital, and ordering him to report at his local board on November 27, 1953, where he would be given instructions as to his employment. In addition the Order stated:

> You are ordered to report for employment pursuant to the instructions of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as you are released or transferred by proper authority.[3]

Johnston appeared before his local board on November 27, 1953, where, according to the stipulation, he was instructed as to his work assignment at the Norristown State Hospital and was told to report there on November 30, 1953 (three days

[3] Although the stipulations filed in both the *Johnston* (No. 643 R. 7), and *Sokol* (No. 643 R. 6) cases refer to the fact that the standard form S. S. S. 153 was sent each of these petitioners, neither stipulation makes it entirely clear that both the order to report to the local board and the order to report for employment pursuant to the instructions of the local board were contained in this form, rather than in instructions given to each petitioner on appearing before his local board in compliance with the first order on the form (see *infra*, pp. 22–23, 56). Since some misapprehension in this respect may have colored the various opinions in these cases and since the terms of the order are highly pertinent to a resolution of the issues of law raised, we have appended to our brief a copy of the standard form sent to petitioner Johnston which was then and is now used to order I–O registrants into work of national importance (see *infra*, p. 56).

after appearing at his local board). (No. 643 R. 7). It was also stipulated that he refused to accept this assigned employment both orally and in a written statement which he submitted to the local board, and thereafter "never physically entered the eastern judicial district of Pennsylvania to report for or to perform the work assigned to him" (No. 643 R 7).

The indictment returned against petitioner Sokol, also in the United States District Court for the Eastern District of Pennsylvania, charged that "on or about April 1, 1954, in the Eastern District of Pennsylvania" he "did knowingly neglect to perform a duty imposed upon him by the provisions of the said Act [the Selective Service Act of 1948, as amended by the Universal Military Training and Service Act] in that he failed to report to the Philadelphia State Hospital, Roosevelt Boulevard and Southhampton Road, Philadelphia, Pennsylvania, for assignment to perform civilian work contributing to the maintenance of the national health, safety or interest, in lieu of induction; in violation of Title 50 Appx. Secs. 456 (j) and 462" (No. 643 R. 3–4).

Sokol attacked the indictment by motion to dismiss on grounds similar to the Johnston motion (No. 643 R. 5). It was stipulated that Sokol registered with his local draft board in the Western judicial district of Pennsylvania where he resided; that he was classified I–O; that he was

sent an Order to Report for Civilian Work (S. S. S. Form 153, see *infra*, pp. 22–23, 56); and that on March 22, 1954, he reported to his local board where he was instructed as to his assignment to the Philadelphia State Hospital.[4] Sokol, like Johnston, "personally refused to accept" his work assignment and "never physically entered the eastern judicial district of Pennsylvania to report for or to perform the work assigned to him" (No. 643 R. 6).

The District Court for the Eastern District of Pennsylvania dismissed both the Johnston and Sokol indictments (No. 643 R. 10). In a memorandum opinion, the court held that although "the duty in each case was to report to the State hospital, the place of performance, in this judicial district, * * * the violation was the defendants' refusal to report to the place of performance" and "the refusal in both cases took place in the Western District of Pennsylvania, and not in this district where defendants were never physically present" (No. 643 R. 9).

On the Government's appeal in both cases, the Court of Appeals for the Third Circuit reversed the judgments and remanded each case to the District Court for the Eastern District of Pennsylvania (No. 643 R. 18–19). In its opinion (No.

[4] The Sokol indictment charges a failure to report to the Philadelphia State Hospital on or about April 1, 1954 (No. 643 R. 3). Sokol thus had ten full days to report to his work assignment after reporting to his local board in compliance with the first order contained on the S. S. S. Form 153.

643 R. 11–17), the Court of Appeals found that the statements made by the petitioners to the local board did not fix the situs of the offenses charged since they (No. 643 R. 13) "are not being prosecuted in the western district for their defiance of the board." "It was in the eastern district where they failed to appear to do the work assigned to them" and "it is this failure which constitutes the offense, if any, in the eastern district."

SUMMARY OF ARGUMENT

I

Each of these three cases involves the prosecution of a 1–O registrant (conscientious objector opposed to both combatant and noncombatant service in the armed services) for failing to report for work of national importance, brought in the judicial district of the place of employment outside the area of the local board that issued the order to report. In the *Patteson* case, the Court of Appeals for the Tenth Circuit sustained the contention that venue of the crime charged could lie only in the district where the local board which issued the order was located. In the *Johnston* and *Sokol* cases, on the other hand, the Court of Appeals for the Third Circuit held that similar indictments were triable where the failure to report occurred, i. e., at the place of employment.

The nature of the duty, the breach of which is the foundation of the charges, can be understood

only against the background of the whole process relating to this type of registrant. These procedures provide that, if the registrant does not himself select appropriate work, the Director of Selective Service assigns him suitable employment. When his name is reached in the process of selection, he is sent an order (S. S. S. Form No. 153, Appendix, *infra*, p. 56) requiring him to do two things: (1) report at the local board for instructions concerning his work assignment, and (2) report for employment at the stated place of employment for 24 consecutive months or until otherwise relieved. Under this order, after reporting to the board to procure his instructions, the next duty required of him is to report to the place of employment.

Since the regulations provide that a conscientious objector will not ordinarily be employed in his own community, it is usually necessary for him to travel to that place. But unlike the procedures which obtained during the period of the public service camp system of World War II, the registrant is not "delivered" to the place of employment, his travel is not usually provided for by the Government, and the time, place, or mode of his leaving is not supervised. How he gets there or when he starts is his own concern—his only duty is to report to the destination at the appointed time. If he fails to report there in compliance with the order, the regulations state that he "shall be deemed to have knowingly failed or neg-

lected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended." 32 C. F. R. 1660.30. If he does report for his work assignment, he remains subject to the obligations imposed by the local board's order until he has satisfactorily completed the assignment, at which time he is relieved from further duty under it.

The procedures today are to be distinguished from those which obtained under the World War II program. At that time, the local board ordered the registrant to appear before it for immediate delivery *by it* to the public service camp. The Government not only paid for the trip to the camp but arranged the method of transportation and set the time of departure. When the trip commenced, the regulations transferred the registrant from the authority of the local board to that of the camp. Under these circumstances, when the registrant reported to the local board he was under the further obligation to submit to being delivered or entrained to the destination by his local board—an intermediate and significant step not provided for in the current regulations. To the extent, therefore, that any of the cases arising under the World War II program suggest that venue for failure to perform civilian work would lie in the district of the local board, they are distinguishable on their facts. Cf. *Dodez v. United States*, 329 U. S. 338.

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The registrants' attempts to make a failure "to start traveling" the basis of the offense has no justification under present procedures. Today, there is no fixed duty to proceed at any certain time and place, and therefore no point at which a duty to proceed can be said to have been definitely breached. The requirement in the order that the registrant "proceed" is merely a method of complying with the single duty which is fixed by the order and regulations—the duty to report at a certain time and place for work. Not until that fixed duty is breached does a violation occur.

II

Although both the registrants and the Court of Appeals for the Tenth Circuit concur in the assumption that the basis of the crime defined by the statute and charged in these indictments is the "refusal" of the registrant in the area of the local board to proceed to the place of employment, rather than the "failure" to report to the place of employment as ordered, the *Patteson* opinion holds that such "refusal" occurred when the registrant told his local board that he would not comply with the order, while the registrants now claim that the "refusal" is simply to be implied from the fact that they took no action after reporting to the local board. Neither view is correct, since the crime charged is the "failure" rather than the "refusal."

Section 6 (j) of the Universal Military Training and Service Act, which defines the obligations of the 1-O registrant, provides that a registrant ordered to perform civilian work, "who knowingly *fails or neglects* to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [the general penalty provision of the Act], to have knowingly *failed or neglected* to perform a duty required of him under this title". [Emphasis added.] See also, to the same effect: 32 C. F. R. 1660.30. Under the Act and the regulations, these registrants are not being prosecuted for their defiance of the board in the district where the board is located, but for their failure or neglect to report for work in the place of the assigned employment. That is the substance of the crime charged in each of these indictments.

As we have pointed out, the order form sent to the registrant in each case, in addition to requiring him first to report to the local board, also ordered him to report to the place of employment. Contrary to the conclusion of the Tenth Circuit in *Patteson*, the registrant does not violate this latter duty when he notifies his local board orally or in writing that he will not comply. The crime is not complete until the time for reporting at the place of employment has come and gone, and he has not reported there. The criminal law recognizes no anticipatory

breach of an obligation while a possibility remains that the duty may be performed.

The assertion of the registrants that a "refusal" is to be implied from the fact that they did nothing after reporting to the local board is but another attempt to refashion a crime of omission into a crime of commission. They argue that the crime was committed, at some indistinguishable moment, when they did not board a train or otherwise proceed to the place of employment. However, there is no duty imposed on the registrant to commence the journey at any fixed time nor, in the usual case, is the mode of travel regulated in any way. The registrant is required only to report to the place of employment at a stated time. It is therefore the failure to perform the latter duty which is the crime.

Since the criminal penalty attaches to the failure to report to the place of employment, venue is properly laid in the jurisdiction where the employment would have been performed. This is consistent with the general rule that, where an omission to act is the crime, venue lies where the act should have been performed. *Rumely* v. *McCarthy*, 250 U. S. 283; *United States* v. *Lombardo*, 241 U. S. 73; see: *United States* v. *Anderson*, 328 U. S. 699, 705, fn. 14.

III

The registrants' arguments, based on the requirement of the Constitution (Art. III, Sec. 2;

Amendment VI) that crimes must be prosecuted where committed, do not further their case. As we have shown, the crime here was committed at the place of the assigned employment. The Constitution does not require that a prosecution for failure to report to an employer in State X must be prosecuted in State Y where the registrant lives and where his local board happens also to be located. Our conclusion in this respect is supported by the opinion of this Court in *United States* v. *Anderson*, 328 U. S. 699, 704–705, since the offense was committed "where the duty violated would be performed, if performed in full".

The registrants' further argument that a rule of convenience should be applied in these cases to fix the venue where the registrants reside and where their local boards are located cannot change the constitutional requirement. While venue in the state of residence or where the draft board is located might be more convenient for these litigants, that would not necessarily be so in other cases involving failure to report for employment. Moreover, under the Constitution, the issue of venue depends upon the nature of the crime, and here the nature of the crime charged shows that it was committed only in the places where the indictments were brought.

ARGUMENT

The registrants and the Government are in substantial agreement that the resolution of the issue

of venue turns on the nature of the duty, the nonperformance of which is the crime charged. The difference between the parties as to the nature of that duty has been sharpened by the precise position the registrants now take in their brief.[5]

The view of the Court of Appeals for the Tenth Circuit in *Patteson* is that, after reporting pursuant to the Order to Report for Civilian Work, the next duty owed by the registrant "was to proceed to Topeka" and that "his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further" (No. 704, R. 12). While the registrants concur in the assumption of the *Patteson* opinion that the next duty after reporting to the local board was "to start traveling" from the local board to the work assignment (Reg. Br. 19), they do not claim that the crime was committed when each notified his local board that he would do nothing further. They now advance the theory that the crime consisted in the "failure to leave home" (Reg. Br. 25), and in "balking" in the area of the local board (Reg. Br. 19). They concede (contrary, we think, to the *Patteson* holding on which they otherwise rely) that the situs of the crime was not fixed by "the place where the statement of refusal was made or the letter of defiance was directed to the local board" but "it is the act of refusal

[5] We shall refer to the brief filed on behalf of Johnston, Sokol, and Patteson as the "registrants' brief" or "Reg. Br."

to take the next step that determines the place of the offense and not the subsidiary or evidentiary statement or declaration that determines the issue" (Reg. Br. 12). They also argue that "a registrant may violate the Act by refusing to take the step from the local board forward to the hospital even without declaring his intent either orally or in writing" (*id.*).

Since clarification of the central issue of venue in these cases depends upon the nature of the duty required of the I–O registrant after reporting to his local board, we will first describe the process by which such registrants are ordered into civilian work of national importance. Then, on the basis of this analysis, we will demonstrate that the duty owed by the I–O registrant after so reporting is to appear at the place of employment at a subsequent time, pursuant to instructions given him by his local board. And finally we will show that neither a statement of refusal to the local board nor a refusal implied by the registrant's nonaction in the area of the local board is the gravamen of the offense, but rather that the crime is the failure or neglect to appear at the work assignment as ordered. It is for this reason that the Government has concluded that prosecution may, under the Constitution, properly be laid only in the district where the work is to be performed.

I

THE SOLE DUTY REQUIRED OF EACH REGISTRANT AFTER APPEARING AT HIS LOCAL BOARD WAS "TO REPORT FOR EMPLOYMENT PURSUANT TO THE INSTRUCTIONS OF THE LOCAL BOARD," AND THAT DUTY COULD BE PERFORMED ONLY AT THE PLACE OF EMPLOYMENT

The registrants' entire argument is based on the erroneous premise that, after reporting to the local board pursuant to the first order contained in the Order to Report for Civilian Work (S. S. S. Form 153, *infra*, pp. 22–23, 56), the next duty of each under the Act and regulations was "to proceed" or "start traveling" to the place of employment—rather than "to report for employment pursuant to the instructions of the local board", the second order contained in the Order to Report form. On the further assumption that they can be prosecuted only for the next required step in the sequence of duties required of them as I–O registrants, they conclude that the only prosecution which could be brought against them would be for failure or refusal to leave the geographical area of their local board.

The nature of the duty can be understood only against the background of the whole procedure relating to this type of registrant. And since the registrants seek support for their position in these cases, which arise under the current selective service program, in decisions under the earlier World War II program, without attempt-

ing to point out the significant changes (Reg. Br. 25), we shall at the outset describe those features of both procedures which bear on the issues involved.

A. UNDER CURRENT SELECTIVE SERVICE PROCEDURES THE REGISTRANT, AFTER REPORTING TO HIS LOCAL BOARD, HAS NO DUTY OTHER THAN TO REPORT FOR EMPLOYMENT

1. The current conscientious objector program

Authority for the establishment of a program of civilian work contributing to the maintenance of the national health, safety, or interest, to which registrants opposed to participation in both combatant and noncombatant military service may be assigned by selective service authorities, is found in Section 6 (j) of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 65 Stat. 75, *supra*, p. 3. We deal here only with the process which occurs after a registrant has been classified as such a conscientious objector, class I–O, and has been found physically acceptable for service.

The regulations provide that the registrant shall then submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest (as defined in Regulation 32 C. F. R. 1660.1) which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any of these types of work to be appropriate it will order the registrant to perform such work (*Ibid.*, 1660.20 (a)). If he

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fails to do this or the submitted list is disapproved, the local board must submit a list of three types of civilian work which it deems appropriate, one of which he may select and be ordered to perform (*Ibid.*, 1660.20 (b)). If the registrant and the local board are unable to agree on suitable employment, the State Director of Selective Service or his representative meets with the registrant and the local board to attempt to reach an agreement (*Ibid.*, 1660.20 (c)). If no agreement is reached, the local board, with the approval of the Director of Selective Service, orders the registrant to report for suitable civilian work (*Ibid.*, 1660.20 (*d*)). The last is the situation in each of the instant cases.

The standard form of the order (S. S. S. Form No. 153), captioned "Order to Report for Civilian Work and Statement of Employer," is sent to the registrant at his mailing address which may or may not be in the vicinity of his residence or his local board (*Ibid.*, 1641.3)). The form contains two orders to the registrant:

> You are ordered to report to the local board named above at ------ m. on the ------ day of ------, 195--, where you will be given instructions to proceed to the place of employment.
>
> You are ordered to report for employment pursuant to the instruction of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as you are released or transferred by proper authority.

The registrant is also informed: "You will be instructed as to your duties at the place of employment" and:

> Failure to report at the hour and on the day named in this order, or to proceed to the place of employment pursuant to instructions, or to remain in this employment the specified time will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both.

When the registrant appears at his local board in compliance with the first of the two orders specified in this form, he is given more detailed instructions explaining the precise time and person to whom he must report at the place of employment. Since no registrant is, except where the national interest demands it, ordered to perform work in the community in which he resides (*Ibid.*, 1660.21), it is usually necessary that he travel to the place of employment. But unlike the World War II system, described *infra*, pp. 27–30, he is not "delivered" to the place of employment by his local board nor does he usually proceed to the place of employment under the aegis of the Selective Service System. Only where it is "necessary" (*i. e.* where the registrant has no personal funds) do the regulations provide travel facilities for him (*Ibid.*, 1660.21 (b)); and as a practical matter no funds have been appropriated to the Selective Service System for this

purpose although every effort is made to supply transportation if absolutely necessary. Usually, no selective service official entrains such registrants, supervises their travel, or meets them at the place of employment. How the registrant gets to his work assignment, after receiving his work instructions, is his own concern. The time given the registrant for reporting varies from case to case. In some cases it may be one or two days, in other cases as long as two weeks or more. In short, after reporting to the local board and receiving instructions as to his work assignment, the next duty owed by the registrant is to appear physically at the place of employment at the appointed time. The method by which he proceeds to that place is not normally supervised by the Selective Service System in any way.[6]

Unlike the situation which obtained under the World War II regulations (see *infra*, 27–30), when the registrant now leaves the local board and

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[6] In contradistinction to this procedure, the registrant who is ordered by his local board to report for induction into the armed forces appears at his local board for that purpose, and is at that time delivered (together with his papers) in a group under the leadership of appointed leaders to the place of induction where the group is met by representatives of the armed forces who are then in charge of him. 32 C. F. R. 1632.14–1632.16. These significant differences refute registrants' contention that there is a precise analogy between "failing to report for induction in the armed forces" and the crimes charged in the instant indictments of failing to report to the place of employment (Reg. Br. 25).

proceeds on his own initiative to the place of employment, he does not thereby pass from the supervision of the local board to another authority, either at the commencement of the trip or at the point of destination. The original order of the local board follows him to his place of employment and is discharged only after he reports to his employer, and then remains in employment for 24 consecutive months unless sooner relieved or unless his employment is changed due to no fault of his own (*Ibid.*, 1660.21 (b)–(d)). The employer is not in the official or supervisory position of a camp director, nor is the place of employment a supervised camp. When the registrant has performed the first duty specified in the order, *i. e.* appearing at the appointed hour before the local board, his next duty under the order is to appear at the place of employment. If the registrant obeys the order and presents himself, the employer notes such fact in the space reserved for that purpose at the bottom of the order to report (see S. S. S. Form No. 153, *infra*, p. 56), and mails the form back to the local board. At that juncture the local board reclassifies the registrant 1–W (conscientious objector performing civilian work, *Ibid.*, 1622.16) and forwards his file to the State Director of Selective Service for the state in which the work is being performed, whose responsibility it is to see that the registrant performs the work specified in the

local board order.[7] When the registrant has satisfactorily completed this work, the State Director of Selective Service then returns the file to the registrant's local board with a letter to this effect (*Ibid.*, 1660.31 (a)). The local board then mails the registrant a certificate evidencing his satisfactory completion of and release from civilian work (*Ibid.*, 1660.31 (c)).

In the event the registrant appears at the local board but does not comply with the second order "to report for employment pursuant to the in-

[7] At one point in their brief, the registrants refer to the fact that Patteson's local board did not transfer his file from Oklahoma to the State Director of Kansas, and conclude from this that "the failure to make this transfer of the file in the *Patteson* case proves that the hospital in this case never had any jurisdiction over the selectee because he did not report to the hospital and accept the assignment" (Reg. Br. 21). This statement evidences a misunderstanding of present procedures. No transfer of "jurisdiction" is involved when the registrant travels to the place of employment, and in any event, the *employer* (who is only that and nothing more) would have no "jurisdiction" over the registrant in any sense of that word. The registrant remains subject to the local board's original order, not only before reporting to the work assignment, but at all times thereafter until finally discharged after satisfactory completion of his assignment 24 months later. While the local board, in a case where a registrant goes to another state to work, will transfer his file to the Selective Service Director for that state for administration, this is done only after a registrant has reported there for his work assignment, the employer has returned his order form with that fact noted by him at the bottom, and the registrant has been reclassified 1-W. (See *supra*, pp. 25-26.) This transfer of the file does not, however, relieve the registrant from his obligation under the original order (S. S. S. Form 153).

structions of the local board", the regulations provide as follows (*Ibid.*, 1660.30):

> *Failure or neglect to obey order to perform civilian work.* Any registrant who knowlingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended. When any registrant fails or neglects to obey any such order, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the Director of Selective Service for a determination as to whether or not the registrant shall be reported to the Department of Justice for prosecution.

This regulation follows Section 6 (j) of the Act which authorizes the assignment of conscientious objectors to work of national importance and provides that "any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, *to have knowingly failed or neglected* to perform a duty required of him under this title." [Emphasis added.]

2. The World War II public service camp program

Under the Selective Training and Service Act of 1940, after a class IV–E (equivalent of present

I–O) registrant was found acceptable, the local board notified the Director of Selective Service that the registrant was available for assignment to work of national importance under civilian direction (S. S. Reg. 652.1). The Director made a selection of suitable employment for him (S. S. Reg. 652.2), and sent an Assignment to Work of National Importance (S. S. S. Form 49) to the local board. The local board prepared the Order to Report for Work of National Importance (S. S. S. Form 50)[8] which informed the registrant as to his Civilian Public Service Camp Assignment and ordered him to appear before the board at a specified time.

Unlike the situation today, when the registrant reported to the local board it was "for [immediate] transportation to a camp" (S. S. Reg. 652.12). After a registrant reported to the board, travel documents were prepared for the trip from the board to the camp (S. S. Reg. 652.12) and he was then and there actually or constructively delivered to the point of departure, *viz* (S. S. Reg. 652.12):

* * * * * *

> Except as otherwise provided herein, the local board will follow the same procedure in *delivering* the registrant to work of national importance under civilian direction as is followed in the case of a registrant *delivered* for induction into the land

[8] See R. 155, *Dodez* v. *United States*, No. 86, O. T. 1946.

or naval forces. 7 F. R. 112. [Emphasis added.]

Reporting to the board, in short, was the first stage in the trip to the camp.[9] The duty required of the registrant, after reporting to the board, was to submit to being entrained to the point of destination ("delivered") by selective service officers.

The registrant remained under the authority of his local selective service board only until the journey to the camp had actually begun. At that point he was by regulation transferred to "the jurisdiction of the camp to which he is assigned"[10] and the local board could "take no further steps with regard to such registrant without instructions from the Director of Selective Service" (S. S. Reg. 652.13). As soon as the registrant left on the trip, but not until that time, he became an "assignee" responsible to the disciplining authority of his camp director under special regulations applicable to such persons

[9] As a practical matter, the IV-E registrants were so few in number that they were usually sent individually rather than in a group. When this was done, the camp was notified that the registrant was being delivered at a certain time, and he was usually met at the place of arrival by a government truck from the camp.

[10] While this transfer did not effect a change in "jurisdiction" in a strictly legal sense, "from the time he [became] a camp member the registrant's duties [were] different and his orders came through different channels of the same agency [the Selective Service System]." *Gibson* v. *United States*, 329 U. S. 338, 357.

(S. S. Reg. 653.12, 8 F. R. 4291; S. S. Reg. 691.17, 9 F. R. 4862) and subject to the requirement that "assignees shall report to the camp to which they are assigned" (S. S. Reg. 653.12). Also "at the time the registrant [left] the local board for the camp" the board transferred copies of his Order to Report and the report of his physical examination to the camp director (S. S. Reg. 652.11 (a) (1)), and the board's duties in his case were completed (see S. S. Reg. 653.5).

When the assignee-registrant reported to camp, the camp director indicated that fact in the registrant's Order to Report (S. S. Reg. 653.11 (a)). The assignee was then given a physical examination to determine whether there was any change since his preinduction physical examination, but regardless of its outcome he was accepted in the camp (S. S. Reg. 653.11 (c) (d).[11]

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[11] Comparable procedures were followed in the period 1940–1944. The registrant was physically examined at an induction center (S. S. Reg. 651.2–651.10), was given a camp assignment by the Director of Selective Service (S. S. Reg. 652.2), and was ordered to report by the local board (S. S. Reg. 652.11). On reporting to the local board, he was delivered to the point of departure for the camp and when the journey commenced came "under the jurisdiction of the camp to which he [was] assigned" (S. S. Reg. 652.13). Prior to 1944, however, if the registrant indicated that his physical condition had changed since his final-type physical examination at the induction center he was again examined at the camp, and could be rejected by the camp director if he failed to qualify physically for his assigned work of national importance (S. S. Reg. 653.11). These changes were significant on the issue of when the administrative process was

B. NONCOMPLIANCE WITH THE DUTY TO REPORT FOR EMPLOYMENT OCCURS ON FAILURE TO REPORT TO THE WORK ASSIGNMENT RATHER THAN ON FAILURE "TO START TRAVELING" FROM THE AREA OF THE LOCAL BOARD OR OF THE REGISTRANT'S RESIDENCE

As we have shown, under present procedures, after the 1-O registrant has reported to his local board in compliance with the first order contained in the Order to Report for Civilian Work (*infra*, p. 56), he is not then delivered to Government officers at the point of destination nor does he usually travel at Government expense or under Government direction as to the time and place of departure or the mode of conveyance. After he reports for instructions as to his employment, he is released and no further duty is imposed on him or demand made of him between that time and the time some days hence when, in accordance with the second order of his local board (as contained in the Order to Report for Civilian Work), he is obligated "to report for employment pursuant to the instructions of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as [he is] released or transferred by proper authority."

The contention of the registrants that criminality attaches to the failure of conscientious objectors, at some undefined and indistinguishable moment, to proceed on the journey to the place of

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complete (cf. *Falbo* v. *United States*, 320 U. S. 549, with *Gibson* v. *United States*, 329 U. S. 338), but are not directly relevant to the venue question.

employment is supported neither by the terms of the Order sent the registrants nor by the current law and regulations, and certainly not by any of the cases they cite arising under the World War II program. We repeat that the Order itself commands that they do only two things: report first at the local board for instructions, and then report at the place of employment for their assigned duties. It neither deals with the time they depart or the mode of travel, and therefore cannot be the basis of a further duty to proceed on the trip to the place of employment, the breach of which would be a separate and distinct crime. Of course, in order to report to the place of employment the registrant must somehow get there, but that fact does not create a new and distinct obligation not provided for in the Order. It is merely the necessary means which the registrant must follow to comply with the second requirement set forth in the local board's Order. He is *not* ordered "to start traveling" (Reg. Br. 19), but rather "to report for employment." His time of departure can vary depending on the mode of travel he chooses to use. He may actually leave his district but change his mind in mid-journey. At no point can his failure to perform the duty required of him be fixed until he fails to do the ultimate act required, *i. e.*, to report for work as ordered.

For this reason, the cases arising under and the arguments drawing analogies to the World War II program have no real bearing on the problems of the instant cases. The registrants place heavy reliance on *Dodez* v. *United States*, 329 U. S. 338 (Reg. Br. 9–11, 22–23, 24, 25), involving a prosecution for failure to obey a local board order issued under the Selective Training and Service Act of 1940 which was prosecuted in the judicial district where the local board was located. Although the issue of venue was not involved, the point seems to be that the selection in that case of the judicial district of the local board settles the issue for this case (Reg. Br. 9–10). Dodez, however, was prosecuted and convicted for failure to report for work of national importance "after being ordered to do so." 329 U. S. at p. 340. After receiving the order to report to the local board for what was then the first stage in the trip to and enrollment in a public service camp (see *supra*, pp. 27–30), he wrote a letter to his board stating his unwillingness to comply, and reasserting his claim to minister status. He admittedly failed to report in person to the local board (see R. 14–15, 56–57, *Dodez* v. *United States*, No. 86, O. T. 1946), and that was the basis of the charge against him. The *Dodez* case therefore is more closely comparable to the situation which would have been presented had these registrants failed to report to their local board in com-

pliance with the first Order on the form they received.[12]

Even had Dodez reported to his local board and refused to submit to being "delivered" to the point of departure for the public work camp, he might have been deemed to have failed to comply with the local board's order (as distinguished from the regulations dealing with assignees who had actually commenced their trip to the camp), since reporting to the local board under the World War II system was for the purpose of "transportation to a camp," and this necessarily included the obligation to submit to delivery and entertainment to the camp (the civilian equivalent of being delivered for induction into the armed services). See *supra*, pp. 28–30. This was the situation in *Jeffries* v. *United States*, 169 F. 2d 86 (C. A. 10) (1948), where that defendant was charged with failing, neglecting and refusing to report to his local board at the time and place designated in the order (S. S. Form 50, *supra*, p. 28). While Jeffries put in an appearance at the local board at the appointed time, the Court of Appeals deemed that his failure to submit to its authority "was as much a noncompliance with the order as if he had not appeared at the office of the Local

[12] There would, however, under present procedures, then be a serious question as to whether the registrants had sufficiently completed the administrative process to be able to attack the validity of their classifications. See *Falbo* v. *United States*, 320 U. S. 549.

Board" and likened such nonaction to a failure to submit to induction into the armed services (*Ibid.*, p. 89).

That case has no bearing here since these registrants are not being prosecuted for failing to obey an order to report to the local board, and, in any event, as we have shown, at present the reporting to the local board does not include the obligation to submit to delivery to an authority other than that of the local board.[13] The Order does not now include an obligation to proceed to the place of work assignment under any particular authority; after reporting to the local board,

[13] The registrants erroneously assume that the only point of differentiation between the instant case and *Dodez* and *Jeffries* lies in the fact that previously the Selective Service System assumed the cost of the tr. el of the registrants, but does not now do so (Reg. Br. 24–25). That is one but not the determinative point of distinction. As we have pointed out, even if the *Dodez* case were at all apposite to the issue of venue, at that time the registrant was ordered to appear at the local board, not for instructions as to work assignment, but for transportation and *delivery* to the camp. The transfer was thus not only an essential and supervised step in the process of enrollment in the camp, but, at the point of departure from the area of the local board, changed the status and obligation of the registrant, relieved him from further obligation to the local board (and, reciprocally, the local board from further duties in his behalf), and brought him under the authority of the camp director, and regulations applicable to "assignees." *Supra* pp. 28–30. Today, on the other hand, the original order of the local board which defines his obligations for the work period follows the registrant wherever he goes and is violated wherever and whenever there is a failure to perform the next duty specifically commanded, until the work assignment has been "satisfactorily" performed. *Supra*, pp. 25–26.

the only fixed duty the registrant now has is to report to the place of employment.

The registrants argue somewhat inconsistently at one point in their brief that the gravamen of the offense was a "failure to leave home" (Reg. Br. 25) and in another that the offense consisted of (Reg. Br. 10) "the refusal to leave the local board and continue on in the process by beginning and completing the link of travel from the place where the local board is located to the place where the civilian work is to be performed." The failure to leave home, is, however, clearly not the offense. The local board's Order, failure to obey which is the basis of these prosecutions, is addressed to the registrant at his mailing address which may be far removed from his home, or the order may be forwarded to him in a distant place. This is by no means an unusual occurrence since conscientious objectors are frequently enrolled in schools and colleges, are traveling when they receive their orders, or have changed their residence after registration. The location of the "home" of the registrant therefore has no necessary significance in resolving the question of where his failure to act occurred. Cf. *United States* v. *Anderson,* 328 U. S. 699, 704–705.

Nor is failure to leave the local board and continue on the journey a definable offense. Manifestly, a registrant has to leave the local board to obey the Order. But he need not necessarily, under present procedures, depart immediately for

his work assignment. He may choose a means of travel which will enable him to spend several hours, or in some cases several days, as he pleases. If in that period of time, he pays a visit, possibly in another judicial district, he has violated no duty under the Act. If, after leaving the local board en route to the place of assignment, he changes his mind, an issue would immediately arise as to the place where the refusal to "proceed" occurred. For instance, a registrant could proceed early to the city of the work assignment and there change his mind; he would not then have complied with the Order of the local board.

Any number of variations can be imagined. The important point is that there is no fixed duty *to proceed* at any certain time and place, and therefore no point at which such a duty can be said to have been definitely breached. The requirement that a registrant "proceed" is merely a method of complying with the duty which *is* fixed, *i. e.,* to report at a certain time and place for work, and it is not until that fixed duty is breached that a violation occurs.

The confusion of the registrants in this respect is probably due to their reliance on discarded procedures whereby reporting to the local board was the first stage of the trip to the public service camp, a journey which took place under definite authority and specific order. Today, the local board's Order does not impose any definite or specific obligation regarding travel to the place of

employment, and none can be created by implication. A plain reading of the Order to Report for Civilian Work makes it clear that the obligation to report to the place of employment arises at the place of employment and not at the locality of the board or the "home" of the registrant.

II

IT IS THE "FAILURE" TO REPORT AT THE PLACE OF EMPLOYMENT WHICH IS PUNISHABLE UNDER THE CURRENT SELECTIVE SERVICE LAW AND CHARGED IN THE INSTANT INDICTMENTS, AND NOT THE "REFUSAL" TO REPORT

The Court of Appeals for the Tenth Circuit in the *Patteson* case seems to have assumed that, even if the registrant's duty (after reporting to the local board) was to report for employment pursuant to the instructions of the local board, that duty was breached when Patteson informed his local board orally and in writing that he would refuse to comply with the order. See No. 704 R. 12: "his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further." Although the registrants now concede that the oral and written declaration of refusal to the local boards was merely evidence of their future intent in this respect and not the criminal act itself (Reg. Br. 12; see *supra*, pp. 18–19), they nevertheless contend that the "refusal" was implied in the fact that

they took no action after reporting to the local board.

To meet this contention we undertake to show that the crime punishable under the statute is a "failure" to act, not a "refusal", either express or implied, and therefore that the crime is punishable only in the jurisdiction where the required act should have been, but was not, performed.

A. THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT PUNISHES ONE WHO "KNOWINGLY FAILS OR NEGLECTS" TO OBEY THE LOCAL BOARD'S ORDER, AND THAT IS THE CRIME CHARGED BY THESE INDICTMENTS

The statutory source of the obligation imposed on the registrant to obey the order of his local board, first to report to the local board and then to report to the place of employment, is found in Section 6 (j) of the Act (*supra,* p. 3), the Section which also creates the conscientious objector exception to the general obligation of military service and prescribes the procedure to be followed in conscientious objector cases. The Section provides:

> Any person * * * shall * * * if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work con-

> tributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person *who knowingly fails or neglects to obey any such order from his local board* shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * * [Emphasis added.]

Section 12 (*supra*, pp. 3–4), referred to in Section 6 (j), is the general penalty provision of the Act, and punishes (50 U. S. C. App. 462 (a)):

> * * * any person * * * who in any manner shall knowingly *fail or neglect or refuse* to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title. * * * [Emphasis added.]

The addition of the word "refuse" in the general penalty clause of the Act (Section 12) cannot alter the specific provision of Section 6 (j) of the Act expressly providing that one who is disobedient to the board's order "shall be deemed, for the purposes of section 12 of this title, *to have knowingly failed or neglected* to perform a duty required of him under this title." [Emphasis added.] Congress could hardly have announced in plainer terms its intent to punish disobedience to an order to report as a "failure" rather than as a "refusal." And even if Section 6 (j) were at all unclear, it has been implemented by a selec-

tive service regulation (32 C. F. R. 1660.30, *supra*, p. 27) providing that "any registrant who knowingly fails or neglects to obey an order from his local board * * * shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended."

As the Court of Appeals for the Third Circuit observes in the *Johnston* and *Sokol* opinion (No. 643 R. 13), "the defendants are not being prosecuted in the western district for their defiance of the board. * * * It was in the eastern district where they failed to appear to do the work assigned to them. And it is this failure which constitutes the offense, if any, in the eastern district." The indictment in the *Sokol* case charges that he (Pet. R. 3–4) "did *knowingly neglect to perform a duty* imposed upon him by the provisions of the said Act in that he failed to report to the Philadelphia State Hospital * * * for assignment to perform civilian work contributing to the maintenance of the national health, safety or interest in lieu of induction; in violation of Title 50 Appx. Secs. 456 (j) and 462." [Emphasis added.] It is apparent that the neglect to report to the Philadelphia State Hospital was an omission to do an act in the district where the Philadelphia State Hospital was located; and the crime charged was committed there, if at all.

Similarly, the *Johnston* indictment charges that he (No. 643 R. 4) "did *knowingly neglect to*

perform a duty imposed upon him by the provision of said Act in that he failed and refused to obey an order of Local Board 87 * * * directing him to report for employment at Norristown State Hospital * * * and to remain employed there for twenty-four consecutive months in violation of Title 50, U. S. C. Appx., Sections 456 and 462, as amended." [Emphasis added.] Here, too, the essential charging language alleges a crime of omission to act (a "neglect to perform a duty") in Norristown, Pennsylvania. The addition of the word "refused" in the specification does not alter the substance of the charging language, and even if it did, it would be discarded as surplusage as the Court of Appeals for the Third Circuit held (No. 643 R. 13). See *Ford* v. *United States*, 273 U. S. 593, 602.

The *Patteson* indictment, after averring that the registrant's local board had (No. 704 R. 1) "issued an order * * * ordering him to report on July 26, 1954, for civilian work * * *", charged that he "did *knowingly and willfully refuse, neglect and fail* to report at the Topeka State Hospital at the time and place so designated in said order." [Emphasis added.] Again, the word "refuse" does not alter the substance of the omission of the duty prescribed by Section 6 (j) of the Act, and to the extent that it charges some crime other than a neglect and failure "to report at the Topeka State Hospital at the time and

place so designated in said order" may also be discarded as surplusage. The substance of the crime charged is failing to report as ordered, and not Patteson's defiant statements to the local board. The crime as defined in the statute was one of omission to act in Kansas rather than of refusing in Oklahoma to perform an act.

B. NEITHER THE EXPRESS OR THE IMPLIED "REFUSAL" OF THE REGISTRANTS, PRIOR TO THE TIME WHEN THEY SHOULD HAVE REPORTED TO THE PLACE OF EMPLOYMENT, CONSTITUTES THE CRIME

Since the crime charged in the instant cases is one of omission rather than commission it is dependent on proof of what the defendant in each case did not do, rather than what he did. The omission to act cannot be made to rest solely on express or implied statements of refusal.

As we have shown, the violation of the second order to report at the place of employment, contained in the registrant's order form, is a command to do an act at the place of employment. *Supra*, pp. 21–27, 31–38, 39–43. Until the time given him by the local board to report has expired, he has not violated the terms of the Order, nor has he failed to act in accordance with the duties presented for I–O registrants in Section 6 (j) of the Act. Whether or not he tells his local board orally or by letter that he will not appear at the place of employment at the prescribed time, the crime of failing to appear is not complete until that time

has come and gone. If a registrant tells his local board on Monday that he will not report to the place of employment on Friday, but on Friday does in fact report, he has committed no crime on Monday. Cf. *United States* v. *Midstate Horticultural Co.*, 306 U. S. 161, 166. The criminal law recognizes no doctrine of anticipatory breach of a prescribed duty while a possibility remains that the duty may be performed. Until the time of final performance arrives and there is an unequivocal failure to act, the crime is not complete.

The *Patteson* opinion does not suggest what the results would have been had that registrant, instead of telling his local board that he would not accept his work assignment, simply done nothing. Under the assumption of the opinion that the crime was committed (No. 704 R. 12) "when he notified his local board in Oklahoma that he would go no further", it is difficult to perceive how the holding would apply where the registrant made no such statement or made equivocal statements not constituting an outright refusal. This illustrates the difficulty of attempting to refashion a crime of omission into a crime involving the doing of an affirmative act. Either there could be no "refusal" at all where the registrant remained silent but did not report, or the court and jury would have to infer a "refusal" in Oklahoma from a silent failure to appear at the Kansas hospital. All such difficulties are avoided once it is accepted that, as we have urged, it is not the act of defying

the board that is punishable and fixes the situs of the crime—it is the failure to report to the place of employment as ordered.

The registrants argue a somewhat different theory to support their contention that the statute punishes a "refusal" and not a "failure" to act. They contend that their failure to appear at the place of employment was, in itself, a constructive or implied refusal to proceed further after reporting to the board and concede, contrary to the *Patteson* analysis, that (Reg. Br. 32) "the making of the statement of refusal by the registrant is mere surplusage". They urge that a refusal may be implied in the fact that they simply failed to act. As suggested above, this is simply an awkward attempt to change what is essentially a crime of omission into a crime of commission. The registrants do not indicate at what point or where such an implied refusal occurred, or would occur in any other case, or what would have been the situation if the registrant, after reporting to the board, had gone to a third district and had there "refused" to proceed further.

This confusion results from their assumption, which we have already discussed (*supra*, pp. 31–38), that there is a duty to commence the journey to the place of employment at a fixed time, and that this definite obligation marks the point where and the time when a violation of the local board's Order occurs. But, as we have demonstrated, that point cannot be fixed under present procedures

which neither prescribe the hour or the mode of travel, but require only that the registrant report at the place of employment at a certain time. The crime does not occur when the registrant refuses to board a train, but only when he fails to appear at the point of destination. Until the hour for reporting arrives, no crime has been committed.

C. UNDER THE GENERAL RULE APPLIED IN THE ABSENCE OF A SPECIAL VENUE STATUTE, A CRIME INVOLVING THE FAILURE TO DO AN ACT IS COMMITTED WHERE THE ACT SHOULD HAVE BEEN DONE

Since, as we have shown, the statute (*i. e.,* Sections 6 (j) and 12, read together) imposes its criminal sanctions on the I–O registrant "who knowingly fails or neglects to obey any such order from his local board," and that is the crime charged here, the place where the act should have been performed fixes the situs of the crime. This Court has so held in other instances where the gist of the crime was an omission to do an act required by law to be done in a place other than the residence of the accused. In *Rumely* v. *McCarthy,* 250 U. S. 283, the New York defendant was charged with failing, neglecting, and omitting to report enemy property and credits under the Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411, with the Alien Property Custodian in the District of Columbia. The Court held that the case was properly triable in the District of Columbia since "the duty imposed

by the statute to make report to the Alien Property Custodian involved the duty to make such report in the District of Columbia, and failure to make it was an offense against the United States committed in that District." 250 U. S. 283, 289.

A similar result was reached in *United States* v. *Lombardo*, 241 U. S. 73, where a demurrer to an indictment in the Western District of Washington, charging the defendant with failure to file a statement in writing with the Commissioner General of Immigration in the District of Columbia as required by the White Slave Traffic Act of June 25, 1910, c. 395, 36 Stat. 825, 826, was sustained on venue grounds. The Court of Appeals for the Second Circuit has applied the same general rule of venue under similar circumstances. *New York Central & H. R. R. Co.* v. *United States*, 166 Fed. 267 (C. A. 2) (indictment charging New York railroad company with "willfully failing" to file rate and charge schedule with the Interstate Commerce Commission in the District of Columbia properly triable there rather than in New York). See also *United States* v. *Commerford*, 64 F. 2d 28, 32 (C. A. 2), certiorari denied, 289 U. S. 759; *State* v. *Peabody*, 25 R. I. 544, 56 Atl. 1028. The rule has also been applied in selective service cases (*Jones* v. *Pescor*, 169 F. 2d 853, 855 (C. A. 8); *Humes* v. *Pescor*, 148 F. 2d 127, 128 (C. A. 8); *United States* v. *Van Den Berg*, 139 F. 2d 654, 656 (C. A. 7); *United*

States v. *Sutter*, 127 F. Supp. 109, 115–116 (S. D. Cal.)), and was adverted to with apparent approval in the opinion of this Court in *United States* v. *Anderson*, 328 U. S. 699, 705, fn. 14.

The registrants seek to distinguish these cases on the basis that (Reg. Br. 26–27) each "involved orders issued by a tribunal in the district where the prosecution was brought and not orders issued by a tribunal outside the district * * *." However, aside from the fact that the cases stating the rule all involve a failure to obey a duty imposed by statute and not by a government agency, they do not stand for the proposition that, where an omission to act is the crime, venue lies where the duty to act originated; they hold that venue lies "where the act should have been performed." *United States* v. *Anderson*, 328 U. S. 699, 705, fn. 14.

Moreover, while the Government has brought these prosecutions in the district of the place of employment because it believed that this was the only district where the crime was committed and therefore the only district in which, under the Constitution, the prosecution could be brought, it should be noted that dismissal of these indictments—which, as we have shown, clearly charged failure to report for employment—can be sustained only by a holding that the district where the work is to be performed has *nothing* to do with the crime. The registrants' theory, at most, would support the view that the crime of failing

to report for employment began in the district of the local board and was completed in the district of employment. On this basis, while a court could then properly transfer the case to the district of the local board under Rule 21 (b), F. R. Crim. P., it would not be justified in dismissing the indictment in the district where the offense was completed since 18 U. S. C. 3237 declares:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed. * * *[14]

To sustain dismissal of the indictment, the registrants have to argue that the district in which the hospital is located has no connection at all with the crime with which they have been charged. But, as we have pointed out, since that crime is the "failure" to report for employment and not the "refusal" to obey the local board's order, it is difficult to believe that the offense was neither "begun", "continued", nor "completed" in the district of the ordered employment. Under 18 U. S. C. 3237, it is not enough to show that the registrants took some action, or should have taken

[14] It is under this section that indictments for tax evasion may be brought either where the taxpayer prepared his returns and forwarded them for filing, or in the district where they were filed.

some action, in the district of the local board; they have to show, as they cannot, that the crime was fully completed in that district.

III

NEITHER THE CONSTITUTION NOR A POLICY OF CONVENIENCE TO THE ACCUSED REQUIRE THAT THE VENUE BE LAID IN A JURISDICTION OTHER THAN THAT WHERE THE FAILURE TO REPORT OCCURRED

The registrants' invocation (Reg. Br. 14–17, 35) of the constitutional right of an accused to a trial "in the State where the said Crimes shall have been committed" (Art. III, Sec. 2, U. S. Constit.) and "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law" (Amendment VI, U. S. Constit.) leads only to the proposition that a crime must be prosecuted where committed—a principle in which we of course concur. But the Constitution does not tell where a crime is committed and certainly it does not lend support to a ruling that a prosecution for failure to report to an employer in State X must be prosecuted in State Y where the registrant lives and where his local board is located—and this is essentially the registrants' contention. The Constitution neither demands that a defendant be prosecuted in the place where he resides (*In re Palliser*, 136 U. S. 257) or the place where he was when the crime was committed. *Salinger*

v. *Loisel*, 265 U. S. 224, 235. As this Court said in *United States* v. *Anderson*, 328 U. S. 699, 704–705, with respect to the venue requirement of the Sixth Amendment:

> The constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence, of the draft board's location, of final and complete performance, all may be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction.

While the exact situation presented by the instant cases was left open in *Anderson*, its rationale would appear to require that, where a registrant has appeared before his local board and has been given a work assignment, the failure to perform the duty required by the Act occurs at the place "where the duty violated would be performed, if performed in full." See also *supra*, pp. 46–50.

The registrants also argue for the application in these cases of (Reg. Br. 30) "a rule of convenience". They say that "all of the witnesses in prosecutions of these cases usually come from the district where the local board is located and the defendant resides" (Reg. Br. 30; see also Reg. Br.

36, 37–38). However, a general rule of venue for selective service cases could hardly be made to depend upon the facts peculiar to these cases. As the Court said in addressing itself to a similar contention in *United States* v. *Lombardo*, 241 U. S. 73, "we hesitate, in order to accommodate the venue of a particular offense, to introduce such confusion". Cases may arise where the draft board is in a jurisdiction different from the residence of the registrant, and where his witnesses are located in the latter place. Other cases may involve the disputed question of whether the registrant did in fact fail to report to the employer, where his witnesses might well come from the place of employment. In other cases where a registrant reports to his local board in State A, and then goes to State B, instead of reporting for employment in State C, his witnesses may be found in State B. Much would depend, in any particular case, on the nature of the defense, *i. e.*, that the defendant did actually report, or that he was improperly classified, or that he was never ordered to report at a specific time, etc. While we concede that there are usually practical advantages for both sides in bringing a prosecution in the district where the draft board is located, the advantage to the defendant of a trial there is certainly not inevitable.

In any event, the issue of venue, which is essentially a problem of analyzing the nature of the

crime itself, is not determinable in this instance by the convenience of the litigants. As we have shown, the crime was wholly committed in the district of the ordered employment. There is no room for construing the Universal Military Training and Service Act to establish this crime as committed in the local board's district. For this reason, cases like *United States* v. *Johnson*, 323 U. S. 273, which interpret other statutes to provide crimes wholly committed at the place of the defendant's residence or presence, are inapposite.[15]

The registrants here envisage horrendous results if some other registrant is ordered and fails to report to employment in such distant places as Japan or Korea. The short answer to this is that I–O registrants are not ordered against their will to work outside the continental United States. In the few instances where such orders have been issued by the local boards, the registrant had volunteered for such assignment, usually under the auspices of denominations such as the Quakers and Mennonites, and in most cases the registrant is already residing in the country involved or the religious organization furnishes his transportation to the foreign country. As a mat-

[15] *United States* v. *Wilson*, and *United States* v. *Purchasing Corporation of America*, 344 U. S. 923, are also of this type.

ter of fact, registrants are not usually ordered even to leave their own state.[16]

All of these considerations converge to the conclusion that the crimes as defined in the Act and as charged in the indictments were committed in the place where, but for the criminal failure, the act commanded should and would have been performed. This conclusion is supported, not only by the text of the Act and the regulations which define the obligations of the I-O registrant, but also by analysis of the nature of the omission which is the basis of the crimes charged in each case. The failure to report for work occurs in the place where the work should be performed.

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[16] An exception to this general policy is involved in the case of Oklahoma registrants. Since Oklahoma has a constitutional requirement that all persons applying for state employment sign a loyalty oath including an oath to bear arms, it is impossible to assign such work to I–O registrants and they are sent to the neighboring state of Kansas. This is the situation in the *Patteson* case.

The problems of district-to-district assignment in *Johnston* and *Sokol* arise only in such states as Pennsylvania having more than one judicial district.

CONCLUSION

For the foregoing reasons, we submit that the judgments of the Court of Appeals for the Third Circuit in No. 643 should be affirmed, and the judgment of the Court of Appeals for the Tenth Circuit in No. 704 should be reversed.

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APRIL 1956.

APPENDIX

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR CIVILIAN WORK AND STATEMENT OF EMPLOYER

Local Board No. 87
Greer Building
NOV 16 1953
24 N. Mercer Street
New Castle, Pa.

November 16, 1953
(Date of mailing)

To PAUL DEEMER JOHNSTON 36 87 33 75
(First name) (Middle name) (Last name) (Selective Service Number)

Mailing address 508 Court St. New Castle Pennsylvania
(Street and number) (City) (State)

Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety, or interest you have been assigned to Hospital work

located at Norristown State Hospital, Stanbridge and Sterigere St.

Norristown, Pennsylvania

You are ordered to report to the local board named above at 10a. m. (hour) on the 27th day of November, 195 3 where you will be given instructions to proceed to the place of employment.

You are ordered to report for employment pursuant to the instructions of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as you are released or transferred by proper authority.

You will be instructed as to your duties at the place of employment.

Failure to report at the hour and on the day named in this order, or to proceed to the place of employment pursuant to instructions, or to remain in this employment the specified time will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both.

Bryan McKeown
(Clerk or Member of the Local Board)

STATEMENT OF EMPLOYER

The registrant identified above reported for civilian work on the ____ day of ____, 195 . to

Name of Employer _____

Address of Employer _____
(Street address) (City) (Zone) (State)

11/30/53

FAILED TO REPORT

J. R. Russell
(Signature of employer or agent)

Personnel Director
(Title)

SSS Form No. 153 (See instructions on reverse side)